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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OLIVER C. HANCOCK,
Counsel for Petitioners.

WILLIAM A. FULLER,
CLIFFORD R. WHEELESS,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinion below	2
Jurisdiction	2
Statutes involved	2
Summary statement	3
The decision of the Circuit Court of Appeals	4
Questions presented	5
Reasons for granting the writ	6
Prayer for writ	9
Brief in support of petition	11
Jurisdiction	11
Specifications of error	12
Applicable law	13
Argument	13

Table of Cases Cited.

Bank of Andrews v. *Gudger*, 212 Fed. 49	7, 14
Duparquet Hout and Moneuse Co. v. *Evans*, 297 U. S. 216, 80 L. Ed. 591	8, 15
Emil v. *Hanley*, No. 551, October Term, 1942 (March 15, 1943) (Law Ed. Adv. Op. Vol. 87, No. 11, p. 643).	16
Merry v. *Jones*, 119 Ga. 643	8, 9, 13
Moore, In re, 42 F. (2d) 475	7
Rutledge v. *Bristol*, 65 F. (2d) 986	7, 14
Straton v. *New*, 283 U. S. 327, 75 L. Ed. 1098	7, 12, 14, 15

Statutes Cited.

Bankruptcy Act, Sec. 70(a), 11 U. S. C. A. Sec. 110(a).	2, 16
Bankruptcy Act of 1938 (Chandler Act) Section 2(a) (21), 11 U. S. C. A. Sec. 11(a) (21)	2, 15
Bankruptcy Act of 1938, (Chandler Act) Section 2(b), 11 U. S. C. A. Sec. 11(b)	16
Georgia Statute, Section 37–407	3
Judicial Code, Sec. 240(a)	2

TEXT BOOK CITED.

	Page
4 Collier, 879–882	17
Collier on Bankruptcy, 14th (1940) Edition, Vol. I, page 305	18

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Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlanta Flooring & Insulation Company, Inc., Capitol Fish Company, Alterman Brothers, Inc., Petitioning Creditors, and W. A. Fuller, Receiver for S. Yoshinuma, Bankrupt, respectfully pray that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in above entitled cause (R. 75), sustaining an order of the District Court of the United States for the Northern District of Georgia.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 71-75) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 25, 1943. An order was signed on July 14, 1943 by Honorable J. C. Hutcheson, Jr., United States Judge, staying the issuance of the mandate of the Circuit Court of Appeals for thirty days from the date of said order to enable appellants to apply for and to obtain the writ of certiorari herein sought. A further stay of the mandate until September 23, 1943, was granted by order passed August 30, 1943. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Statutes Involved.

The United States Court Receiver filed his petition for a turn-over order under the following provisions of the Bankruptcy Act, to-wit:

Section 70 (a); U. S. C. A., Title 11, Sec. 110 (a):

> "The trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all his property * * * The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

The United States Court Receiver contends that he was entitled to a turn-over order under the foregoing statute, regardless of the amendment in the Chandler Act of 1938, reading as follows:

Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21):

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of

creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and accounting shall not be required, except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy * * *"

The Georgia Statute under which the State Court proceeding was instituted is as follows:

Section 37-407: "Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties in a reasonable time."

Summary Statement.

Fuller, the United States Court Receiver for S. Yoshinuma, Bankrupt, filed his petition in the District Court for a turn-over order directed to Marvin G. Russell, State Court Receiver appointed in proceedings instituted by Oberdorfer Insurance Agency in Fulton Superior Court against the said S. Yoshinuma. Russell was an equity receiver in a suit nominally in aid of the collection of a small judgment of $235.00 principal, besides interest and costs, totalling $276.50, but in fact and in effect an insolvency proceeding to conserve the assets of the defendant and divide them among creditors. The main purpose of the petition was to obtain the character of relief appropriate only in insolvency

proceedings and the enforcement of the small judgment lien was merely an incident in the case, and is not sufficient in law to save the proceeding from the nullifying effect of bankruptcy on pending State insolvency proceedings.

The equitable petition in the State Court alleged insolvency, asked the aid of equity; asked for the appointment of a receiver for the assets of defendant; asked that the receiver be directed to operate the business until it could be sold or liquidated and the assets marshalled and the creditors paid according to their rank, dignity and priority (R. 38, 39). The petitioner in the State Court did not ask that his lien be set up and established as a prior lien entitled to priority of payment and did not pray for any relief whatever in support of his alleged prior lien. The prayers of the petition (Pages 4 and 5 of the certified record) are the prayers usually incident to an insolvency proceeding seeking an equity receiver to conserve the assets and sell them and divide the proceeds among the creditors.

The matter was referred to the local Referee as Special Master, who decided against the turn-over order mainly, if not entirely, on the ground that, as more than four months had elapsed between the date the State Court Receiver was appointed and the date the bankruptcy proceedings were instituted, he was not authorized under the provisions of Section 2 (a) (21) of the Bankruptcy Act of 1938 to order the assets surrendered by the State Court Receiver to the Receiver of the United States Court. Exceptions were filed and on hearing the United States Judge sustained the report of the Special Master and denied the petition for a turn-over order. On appeal, the judgment of the District Court was affirmed by the Circuit Court of Appeals.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held (1) that the State Court proceedings were not insolvency proceedings but were

for the enforcement of a lien, and (2) that said proceedings, having been instituted more than four months before bankruptcy, would not be superseded by bankruptcy.

The court held, in effect, that the State Court proceedings were not insolvency proceedings to conserve the assets and divide them among the creditors. This holding, we submit, was an erroneous major premise and led to an erroneous conclusion. We further submit that the State Court proceedings provided for an administration of the debtor's assets and a winding up of his affairs similar to that provided in the national bankruptcy act and that such proceedings were in fact and effect insolvency proceedings and as such are null and void and must yield to bankruptcy whether commenced within four months or before.

The Circuit Court's decision was also based, as indicated by the authorities cited (R. 74) upon the legal proposition that state court insolvency proceedings are superseded by bankruptcy only where provision is made in the state laws for the discharge of the debtor.

We submit that, under the decisions hereinafter quoted, the existence of a discharge provision is not a condition precedent to the supercession of state insolvency proceedings by bankruptcy.

Questions Presented.

1. Whether a State Court insolvency proceeding, tantamount to bankrutpcy, is superseded by bankruptcy whether instituted within, or more than four months before bankruptcy.

2. Whether Section 2 (a) (21) of the Chandler Act of 1938 (U. S. C. A. Title 11, Sec. 11) quoted hereinbefore, changes the well established rule that such proceedings are superseded by bankruptcy, whether commenced within four months of the filing of the petition in bankruptcy or before.

3. Whether a state court insolvency proceeding is tantamount to bankruptcy when it provides for the conservation and administration of the debtor's assets and the winding up of his affairs similar to that provided by the National Bankruptcy Act and a division of the assets among his creditors,—whether or not the state law undertakes to provide for a discharge.

4. Whether a state court insolvency proceeding, tantamount to bankruptcy, is superseded by bankruptcy although nominally in aid of a judgment lien, if in fact and effect it provides for the conservation and administration of the debtor's assets and the winding up of his affairs similar to that provided by the National Bankruptcy Act and a division of the assets among his creditors.

Reasons for Granting the Writ.

1. The Circuit Court of Appeals has decided an important question of Federal law in a manner which conflicts with the applicable decisions of this Court and with the decisions of the Circuit Court of Appeals of other circuits.

The Circuit Court of Appeals we respectfully submit, erroneously held that the State court proceeding was not superseded by bankruptcy because, it decided, the proceeding was one in equity in aid of a judgment obtained more than four months prior to bankruptcy. However, we further submit, as a matter of law and of fact, it was an insolvency proceeding with all the allegations, indicia and prayers of such a proceeding, and the aid sought for the nominal judgment involved, a total of $276.50, was purely incidental to the main and real purpose of the bill. It was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings

"are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* vs. *New,* 283 U. S. 327; 75 Law Ed. 1098.

The decision of the Circuit Court of Appeals conflicts with the foregoing decision of the Supreme Court, as well as the decision, in re: *Bank of Andrews, et al.* vs. *Gudger,* 212 Fed. 49 (3) (CCA Fourth Circuit); the court in the latter case holding:

> "The pendency of a suit in a state court for the dissolution of a corporation, instituted by minority stockholders, and the possession of the corporate property by a receiver appointed therein, did not deprive creditors of their right to have the corporate assets brought into the bankruptcy court for administration there, where they duly asserted that right and had the corporation declared bankrupt as soon as it was known to be insolvent and had committed an act of bankruptcy, *though the receiver was appointed more than four months before the filing of the petition;* as stockholders could not acquire through the receiver or otherwise any lien or other claim not subordinate to the rights of creditors." (Emphasis ours).

And the Judges of the Circuit Court of Appeals for the Fifth Circuit are not in entire agreement on this point as will appear from the strong dissenting opinion of Judge Sibley in *Rutledge* vs. *Bristol,* 65 Fed. (2d) 986, where on page 988 he says:

> "Undoubtedly a court of bankruptcy has superior and exclusive jurisdiction of general insolvencies; and state proceedings of that sort, whether more than four months old or not, yield to the bankruptcy. *Straton* vs. *New,* 283 U. S. at page 327, 51 S. C. 465, 75 Law Ed. 1060; *Hooks* vs. *Aldredge,* (CCA), 145 Fed. 865; *Merry* vs. *Jones,* 119 Ga. 643."

Also, in re: *Moore, et al.,* 42 Fed. (2d) 475, Judge Sibley in the opinion on page 478 says with reference to the de-

mand of the United States Court Receiver for assets in the hands of the State Court:—"A refusal to surrender could be based only on a finding that the case in the State Court was one that should proceed notwithstanding bankruptcy. *Merry* vs. *Jones,* 119 Ga. 643; *Carling* vs. *Seymour Lumber Company* (CCA) 113 Fed. 483. The bill before the State Court dealt with a specific tract of land and with a special class of creditors' interest in it; but it was sought to require all creditors to intervene and to enjoin them from proceeding elsewhere, and also sought an administration of the entire estate of the Moores, alleging them to be insolvent. Its general character was a creditors' bill. *Merry* vs. *Jones, supra; McGahee* vs. *Crookshank,* 133 Ga. 652."

Moreover, the decision of the Circuit Court of Appeals, if based upon the authorities cited in it, holds that, for a State court insolvency proceeding to be superseded by bankruptcy, it must be based upon a State statute which attempts to give an insolvent debtor a discharge. This we submit is erroneous. If all the other elements of an insolvency proceeding are present, that is,—the petition and prayers for the appointment of a receiver for an insolvent debtor, the conservation and administration of the debtor's assets, the sale of said assets and the winding up of his affairs similar to that provided in the national bankruptcy act, and the division of his assets among his creditors;—it is not necessary that the proceedings in the State court be based upon a statute that undertakes to provide for a discharge.

No such condition precedent is stated by the Supreme Court of the United States in declaring when State insolvency proceedings are superseded,—in re: *Straton* vs. *New,* 283 U. S. 327, 75 Law. Ed. 1098 (*supra*). And in re: *Duparquet Hout and Moncuse Company* vs. *Evans,* 297 U. S. 216, 80 Law. Ed. 591, Mr. Justice Cardozo, in the opinion on page 595 says:—

"It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rept. (N. S.) 661."

2. The Circuit Court of Appeals has decided an important question of local law in a manner which conflicts with the applicable decisions of the Supreme Court of Georgia and of this Court.

The Supreme Court of Georgia in *Merry, Trustee,* vs. *Jones, Receiver,* 119 Ga. 643, says:—

"1. Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy.

2. *But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending State insolvency proceedings.* (Emphasis ours).

3. In the present case, the mortgage does not appear in the record, the pleadings do not describe the mortgaged property, and there is no prayer for a foreclosure. The prayers, to marshal the assets, to enjoin other creditors from proceeding except in such suit, and to appoint a receiver to take charge of all the property of the defendant, are adjusted to insolvency proceedings, and not to the foreclosure of a mortgage."

The prayers of the petitioner in the State court proceedings in the case under review follow very closely the prayers in the *Merry* case in that the prayers sought an administration of the insolvent debtor's assets, the appointment of a receiver to conserve the assets, the winding up of the

debtor's affairs, the enjoining of creditors from proceeding elsewhere, and the administration and sale of the assets and division of the proceeds among the creditors. As stated pointedly by Judge Sibley, these prayers were adjusted to insolvency proceedings and not to the enforcement of the small judgment lien nominally the basis of the suit.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

OLIVER C. HANCOCK,
Counsel for Petitioners,
1103 Citizens & Southern Bank Bldg.,
Atlanta, Georgia.

WILLIAM A. FULLER,
630 Citizens & Southern National Bank Building,
Atlanta, Georgia.
CLIFFORD R. WHEELESS,
Citizens & Southern National Bank Building,
Atlanta, Georgia.
Of Counsel for Petitioners.

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ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on June 25, 1943. An order was signed on July 14, 1943 by Honorable J. C. Hutcheson, Jr., United States Judge, staying the issuance of the mandate of the Circuit Court of Appeals for thirty days from the date of said order to enable appellants to apply for and to obtain the writ of certiorari herein sought. A further stay of the mandate until September 23, 1943 was granted by order passed August 30, 1943. The jurisdiction of this

Court is invoked under Sec. 240 (a) of the Judicial Code as amended.

Specifications of Error.

1. The Circuit Court of Appeals erred in not holding that the State Court insolvency proceedings, tantamount to bankruptcy, were superseded by bankruptcy whether instituted within or more than four months before bankruptcy.

2. The Circuit Court of Appeals erred in holding that the State Court proceedings, brought more than four months before bankruptcy, were not insolvency proceedings but were for the enforcement of an existing lien.

This finding was erroneous because the State Court proceedings were in fact and effect insolvency proceedings, having all the allegations, indicia and prayers of such a proceeding, and the aid sought for the nominal judgment involved, (a total of $276.50) was purely incidental to the main and real purpose of the bill.

This finding was erroneous because the State Court bill was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings "are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* v. *New*, 283 U. S. 327, 75 L. Ed. 1098.

3. The Circuit Court of Appeals erred in holding (inferentially from the authorities cited in the opinion, though not in precise language) that the state court insolvency proceedings were not superseded by bankruptcy because not based upon a State Statute which attempts to give an insolvent debtor a discharge.

This finding was erroneous because all the elements of an insolvency proceeding were present, that is, the petition

and prayers for a receiver for an insolvent debtor; the conservation and administration of the debtor's assets; the sale of said assets; the winding up of his affairs similar to that provided in the National Bankruptcy Act; and the division of his assets among his creditors.

4. The Circuit Court of Appeals erred in holding that appellants were not entitled to the turn-over order sought by them.

Applicable Law.

We have cited in our petition herein decisions showing the conflict between the decision under review and the applicable decisions of the Supreme Court and other Circuit Courts of Appeal, and the Supreme Court of Georgia.

The State Court Bill Was a Creditors' Insolvency Proceeding

The general character of the State Court bill was that of a creditors' bill. The main purpose was to obtain the relief appropriate only in insolvency proceedings, and the fact that aid was sought for plaintiff's small judgment lien does not save the case from the nullifying effect of bankruptcy on pending state insolvency proceedings.

In re *Merry, Trustee,* v. *Jones, Receiver,* 119 Ga. 643, quoted in our petition, the Supreme Court of Georgia says:

> "1. Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceedings, a receiver's possession thereunder will not be affected by a subsequent adjudication in bankruptcy.
>
> 2. *But where the main purpose of the petition is to obtain relief appropriate only in insolvency proceedings, the fact that a mortgage may be foreclosed as an incident therein will not save the case from the nullifying effect of bankruptcy on pending State insolvency proceedings.* (Emphasis ours.)

3. In the present case, the mortgage does not appear in the record, the pleadings do not describe the mortgaged property, and there is no prayer for a foreclosure. The prayers, to marshal the assets, to enjoin other creditors from proceeding except in such suit, and to appoint a receiver to take charge of all the property of the defendant, are adjusted to insolvency proceedings, and not to the foreclosure of a mortgage."

The State Court bill was an insolvency proceeding "tantamount to bankruptcy" because it provided for an administration of the insolvent debtor's assets and a winding up of his affairs similar to that provided by the national act; and such proceedings "are utterly null and void whether commenced within four months of the filing of a petition in bankruptcy or before". *Straton* v. *New,* 283 U. S. 327, 75 L. Ed. 1098.

See also the case of *Bank of Andrews, et al.,* v. *Gudger,* 212 Fed. 49 (3) (C. C. A. Fourth Circuit) quoted in our petition; and the dissenting opinion of Judge Sibley in re *Rutledge* v. *Bristol,* 65 F. (2d), on page 988, also quoted in our petition.

A State Court Insolvency Proceeding May Be Tantamount to Bankruptcy Without Being Based Upon a State Court Statute Providing for a Discharge.

In the opinion, the Circuit Court of Appeals quotes several cases, one or two of which seem to hold that for a state court proceeding to be superseded by bankruptcy, it must be based upon a State Statute which attempts to give an insolvent debtor a discharge.

But a state court proceeding can be *tantamount* to bankruptcy, that is, of the general character of bankruptcy, without the discharge provisions. If all the other elements of an insolvency proceeding are present, that is—the petition and prayers for the appointment of a receiver for an insolvent debtor, the conservation and administration of

the debtor's assets, the sale of said assets and the winding up of his affairs similar to that provided in the national bankruptcy act, and the division of his assets among his creditors;—it is not necessary that the proceedings in the state court be based upon a statute that undertakes to provide for a discharge.

As stated in the petition, no such condition precedent is stated by the Supreme Court of the United States in declaring when state insolvency proceedings are superseded in re: *Straton* v. *New*, 283 U. S. 327, 75 L. Ed. 1098 (*supra*). And in re: *Duparquet Hout and Moneuse Company* v. *Evans*, 297 U. S. 216, 80 L. Ed. 591, Mr. Justice Cardozo, in the opinion on page 595 says:

> "It is common learning that an equity receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross* v. *Irving Trust Company*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rep. (N. S.) 661."

Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21) of the Chandler Act of 1938, Does Not Alter the Law as to the Supersession of State Court Insolvency Proceedings by Bankruptcy.

Section 2 states the powers of courts of bankruptcy, and under Section 2 (a) (21); U. S. C. A. Title 11, Sec. 11 (a) (21), they may:

> "Require receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the pro-

visions of the arrangement or plan, and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: Provided, however, that such delivery and account shall not be required, except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made or the agent was authorized more than four months prior to the date of bankruptcy * * *."

This section is to be construed with the two following sections:

Section 2 (b); U. S. C. A. Title 11, Sec. 11 (b):

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Section 70 (a); U. S. C. A., Title 11, Sec. 110 (a):

"The trustee of the estate of a bankrupt, and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy * * * to all his property * * *. The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court."

In *Emil* v. *Hanley, No. 551, October Term, 1942,* decided March 15, 1943 (Law Ed. Adv. OP. Vol. 87, No. 11, page 643), the Supreme Court of the United States says:

"The main purpose of Section 2 (a) (21) was to give the bankruptcy court control over disbursements made in non-bankruptcy proceedings prior to the filing of the petition. The House Judiciary Committee in its report stated: 'There is no logical reason why the bankruptcy court could not supervise these expenditures, since all of the previous proceedings are nullified by the petition in bankruptcy followed by an adjudication. The principle is the same as that involved in Section 60 (d)

of the act where it is provided that fees paid to the attorney for the debtor prior to bankruptcy and in contemplation thereof are subject to review by the bankruptcy court.' H. Rep. No. 1409, *supra*, p. 20. That is as plain an indication as could be made that Section 2 (a) (21) was designed to define the powers of the bankruptcy court only where bankruptcy superseded the prior proceedings."

In footnote 4, immediately following the matter quoted, the court says:

"We do not of course include that supersession which flows from the fact that state insolvency laws are involved which are 'tantamount to bankruptcy'." Here the footnote refers to *Straton* v. *New*, *supra*, page 327.

In the conclusion of the opinion in *Emil* v. *Hanley*, *supra*, the Supreme Court says on page 647:

"Little need be said about Section 69 (d). It must be read in connection with Section 2 (a) (21). The legislative history suggests that it, too, was designed to apply only where bankruptcy superseded the prior proceedings. H. Rep. No. 1409, *supra*, p. 12. As stated by the draftsman, 'It makes clear and certain the exclusive and paramount jurisdiction of the bankruptcy court over property dealt with in a prior equity receivership or like proceedings which is superseded by a bankruptcy proceeding.' Weinstein, op. cit. p. 154. And see 4 Collier, op. cit. pp. 879-882."

This citation to 4 Collier, 879-882 refers to the text discussing Section 69 (d), defining the duties of non-bankruptcy officers after a petition has been filed. In footnote (8), page 882, it says:

"It appears both logical and necessary that such a provision must be read together with the grant of power confined in Section 2 (a) (21). Under Section 2 (a) (21) the bankruptcy court has jurisdiction only over non-bankruptcy liquidation officers, and only where the proceeding or arrangement under which they

> are acting has been instituted within four months of bankruptcy, unless the proceeding was void under State law or was begun under a state statute which in effect is held to be a state insolvency law repugnant to the Bankruptcy Act."

The conclusion, therefore, is that the State Court insolvency proceedings are superseded by the bankruptcy in this case, "whether commenced within four months of bankruptcy or before." To the same effect, see Volume I, Collier on Bankruptcy, 14th (1940) Edition, page 305, where the text referring to non-bankruptcy receivers or trustees says "If, however, the receivership or trusteeship is initiated under a State statute which is in effect a state insolvency law tantamount to bankruptcy legislation, then such receivership will be superseded by bankruptcy, whether or not within the four months' limit prescribed by clause (21), as such proceedings are utterly null and void."

Respectfully submitted,

OLIVER C. HANCOCK,
Counsel for Petitioners,
1103 Citizens & Southern
National Bank Building,
Atlanta, Georgia.

WILLIAM A. FULLER,
630 Citizens & Southern
National Bank Buildng,
Atlanta, Georgia;
CLIFFORD R. WHEELESS,
1103 Citizens & Southern
National Bank Building,
Atlanta, Georgia,
Of Counsel for Petitioners.

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No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

vs.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER

BRIEF IN BEHALF OF RESPONDENTS TO PETITION FOR CERTIORARI

H. A. ALEXANDER,
J. KURT HOLLAND,
BENTON E. GAINES,
JOSEPH J. FINE,
Attorneys for Respondents.

J. KURT HOLLAND,
Attorney for Oberdorfer Insurance Agency, Inc.

BENTON E. GAINES,
JOSEPH J. FINE,
Attorneys for Marvin G. Russell, Receiver.

INDEX

SUBJECT INDEX

	Page
I. Response	1
A. Statement of the Case	1
(1) Controversion	1
(2) Additional Statement of Facts	3
B. Questions Presented	3
C. Reasons for Granting the Writ	4
(1) First Ground	4
(2) Second Ground	8
II. Conclusion	8
A. Nature of State Court Proceeding	8
B. Georgia Insolvent Traders Act	11
C. Summary	12
III. Appendix	14

STATUTES CITED

Bankruptcy Act of 1938 (Chandler Act) Section 2 (a) (21), 11 U. S. C. A. Sec. 11 (a) (21)	12, 13
Bankruptcy Act, Sec. 70 (a), 11 U. S. C. A. Sec. 110 (a)	12
Georgia Code, Section 28-402	11, 14
Georgia Code, Section 37-401	9, 14
Georgia Code, Section 37-405	9, 14
Georgia Code, Section 37-407	9, 10, 15
Georgia Code, Section 37-408	9, 15
Georgia Code, Section 55-106	9, 15

TABLE OF CASES

Page

Bank of Andrews Et. Al. v Gudger, 212 Fed. 49 5

Blair v Brailey, 221 Fed. 1, 136 C. C. A. 524 (Cert. denied 283 U. S. 634, 59 L. Ed. 1499) 12

Bryan v Speakman, 53 Fed. 2d 463 12

Carling v Seymour Lumber Co. (C. C. A. 5) 113 Fed. 483 (Cert denied 186 U. S. 484, 46 L. Ed. 1261) 8, 10, 11

Dinkler v Baer, 92 Ga. 432, 17 S. E. 953 3

Duparquet, Hout & Moneuse Co. v Evans, 297 U. S. 216, 80 L. Ed. 591 7

Emil v Hanley, 63 S. Ct. 687 (March 15, 1943) 12

Fitzpatrick v Paulding, 131 Ga. 693, 63 S. E. 213 3

Gross v Irving Trust Co., 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605 7

International Shoe Co. v Pinkus, 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318 12

Mayer v Hellman, 91 U. S. 496, 23 L. Ed. 377 12

McGahee v Cruickshank, 133 Ga. 649 7

Merry, Trustee v Jones, Receiver, 119 Ga. 643, 46 S. E. 861 ..... 7, 8

Metcalf v Barker, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122 12

Miller v Sherry, 2 Wall 237, 17 L. Ed. 827 10

In Re: Moore, 42 Fed. 2d 475 6

Muffler v Pettigrew Real Estate Co., 132 Fed. 2d 479 (Cert. denied 63 S. Ct. 1329, 87 L. Ed. 1168) 12

Nelson Et. Al. v Spence Et. Al., 129 Ga. 35, 58 S. E. 697 8

Peck v Jennes, 7 How. 612 6

Pickens v Jackson, 152 Ga. 100, 108 S. E. 536 2

Railway Co. v Pettus, 113 U. S. 116-124, 5 S. Ct. 387, 28 L. Ed. 915 10

Rutledge v Bristol, 65 Fed 2d 986 5

Smith v Manning, 155 Ga. 209 (3a) 10

Stellwagen v Clum, 245 U. S. 605, 38 S. Ct. 315, 62 L. Ed. 507 12

Stratton v New, 283 U. S. 327, 51 S. Ct. 465, 75 L. Ed. 1060 ..... 5, 12

Sturges v Crowninshield, 4 Wheat. 122, 4 L. Ed. 529 12

Terry v Anderson, 95 U. S. 628, 24 L. Ed. 365 10

United States v Hosmer, 76 U. S. 432, 19 L. Ed. 662 2

D. E. Virtue v Creamery Package Mfg. Co., 227 U. S. 8, 57 L. Ed. 393 4

In Re: White Star Refining Co., 74 Fed. 2d 269 12

Yaryan Naval Stores v Borchardt, 217 Fed. 758 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 359

ATLANTA FLOORING & INSULATION COMPANY, INC., CAPITOL FISH COMPANY, ALTERMAN BROTHERS, INC., PETITIONING CREDITORS, AND W. A. FULLER, RECEIVER FOR S. YOSHINUMA, BANKRUPT,

Petitioners,

VS.

OBERDORFER INSURANCE AGENCY AND MARVIN G. RUSSELL, RECEIVER

Respondents.

RESPONDENTS BRIEF

1.

RESPONSE

A.

STATEMENT OF THE CASE

(1)

Controversion

Respondents are not satisfied with the statements of fact in this case as presented by the petitioners in the petition for certiorari, and they are controverted in the following particulars, to-wit:

On page four of the printed petition in this case, petitioners say: "The petitioner in the State Court did not ask that his lien be set up and established as a prior lien entitled to priority of payment and did not pray for any relief whatever in support of his alleged prior lien." Respondents contend that there is nothing in the record in this case to justify that statement. Certain allegations of the State Court petition are set out in the record at pages 37, 38 and 39, but the prayers of the State Court petition were *not in the record in the Courts below* nor are they contained *in*

the record before this Court; they are not contained in the copy of the record of the proceeding in the United States Circuit Court of Appeals for the Fifth Circuit served on respondents, although referred to on page four of the petition for certiorari as being contained at "pages four and five of the certified record."

This Court has held in the case of *United States v. Hosmer*, 76 U. S. 432, 19 L. Ed. 662, as follows:

> "The Supreme Court could not take cognizance of any fact beyond the scope of the record as it was made in the Court below."

If, however, the prayers of the petition in the State Court are in the record in this case by some means unknown to your respondents, respondents wish to call particular attention to the enumerated allegations of the petition in the record at pages 37, 38 and 39 thereof, and in connection therewith paragraph (h) of the prayer as follows:

> "That petitioner have such other and further relief as is equitable and meet in the premises."

Respondents submit that there is no prayer to "divide the proceeds among the creditors," but a prayer that "the respective rights, dignity and priority of all creditors be set up and established herein."

However, the State Court petition is amendable by adding additional prayers, if such prayers are consistent with the nature of the case made by the petitioner. See *Pickens v. Jackson*, 152 Ga. 100, 108 S. E. 536, headnote nine as follows:

> "An amendment to the petition, which does not add a new and distinct cause of action, or new and distinct parties, is not demurrable on the ground that it 'adds additional prayers praying for new and different relief' if such prayers are consistent with the nature of the case made by the petition. This ground of the demurrer should have been overruled."

See also, *Fitzpatrick v. Paulding*, 131 Ga. 693, 63 S. E. 213; *Dinkler v. Baer*, 92 Ga. 432, 17 S. E. 953.

(2)

Additional Statement of Facts

Respondents feel that additional facts are necessary to a clear understanding of the issues here. They are as follows:

Oberdorfer obtained a judgment against Yoshinuma, on the 29th day of April, 1942, on which a nulla bona was entered by the officer charged with its enforcement, and thereafter, after having exhausted its legal remedies, Oberdorfer filed an equitable petition for the enforcement of its judgment lien in the Superior Court of Fulton County, Georgia, on May 13, 1942. On the same day Marvin G. Russell was appointed receiver by that Court, and took possession of the assets now in dispute (R. 8, 9, 36).

On September 15, 1942, an involuntary petition in bankruptcy was filed in the District Court of the United States for the Northern District of Georgia against the defendant, Yoshinuma, and, consenting thereto, he was subsequently adjudicated a bankrupt (R. 12).

A period of more than four months elapsed between the appointment of a receiver in the State Court and the filing of the petition in bankruptcy in the Federal Court.

B.

QUESTIONS PRESENTED

Under the heading "Questions Presented," petitioners here contend that one of the questions presented is whether a "State Court insolvency proceeding tantamount to bankruptcy is superseded by bankruptcy whether instituted within or more than four months before bankruptcy." This question is raised under all four of the paragraphs under this heading, and each of the points made are entirely predi-

cated upon that question. Attention of this honorable Court is called to the fact that this question was not raised in the "Statement of Points" and "Assignments of Error" in the record on appeal to the United States Circuit Court of Appeals for the Fifth Circuit (R. 18, 19, 20, 21). On the contrary, in the second assignment of error in CCA, in paragraph (d) thereof, petitioners use the following language:

> "Appellants contend that the bill in equity filed in the State Court was an equitable petition in aid of a common law judgment . . . " (R. 19).

The petitioners conceded that this question was not raised in the Court below, in a proceeding filed by them in the State Court after the completion of the trial of this case in the District Court, where they alleged that the State Court petition was for "the enforcement of a common law judgment lien, and was not, as a matter of law a creditors' bill" (R. 62, paragraph 2) ; and *where it was not raised in the Court below, it cannot now be raised in this Honorable Court for the first time.* See the case of *D. E. Virtue v. Creamery Package Manufacturing Co.*, 227 U. S. 8, 57 L. Ed. 393(3), where the Court said:

> "A contention not made either in the Circuit Court or the Circuit Court of Appeals, and which is contrary to the theory on which the case was tried, will not be considered by the Federal Supreme Court."

C.

"REASONS FOR GRANTING THE WRIT"

(1)

First Ground

Replying to the first ground cited by petitioners as "Reason for Granting the Writ," respondents respectfully urge that the decision in the case at bar is not in conflict with the applicable decisions of this Court nor with any decisions of the Circuit Courts of Appeal of other Circuits, nor with the other decisions cited by petitioners.

So far as we are able to determine, the only basis for the contention that there is such a conflict, is the contention by the petitioners that the State Court proceeding in this case was one under a statute "tantamount to bankruptcy"; and we have shown that that point was not in issue in the Courts below.

Nevertheless, we shall attempt to show that the cases cited by petitioners are not in conflict with the decision in the case at bar, as follows:

The case of *Stratton v. New*, 283 U. S. 327, 51 S. Ct. 465, 75 L. Ed. 1060, is, as the Circuit Court of Appeals decided, authority for the decision in this case, as will be seen by the history of the development of the law as contained not only in the case of *Stratton v. New, supra,* but in the cases cited therein;

The case of *Bank of Andrews, et al, v. Gudger,* 212 Fed. 49, is distinguishable from the case at bar in several particulars, illustrated by the opinion of the Court itself. The Court said:

> " . . . Stockholders could not acquire, through the receiver or otherwise, any lien or other claim not subordinate to the rights of creditors."

and further:

> "Such a case (stockholder's case) is entirely apart from those cases in which a creditor has come into a State Court and established or acquired by his suit a legal or equitable lien on property in the hands of the Court four months before the filing of the petition in bankruptcy. In such cases, the Courts have held that the creditor is entitled to enforce his lien in the first Court that acquired jurisdiction. The distinction is also evident between this case and those cases where the State Court held the property by its receiver . . . "

The case of *Rutledge v. Bristol,* 65 Fed. 2d 986, is not in conflict with, and is, in our opinion, clearly distinguishable from the case at bar. In that case, the Court said:

> " . . . The petitioner in the Rutledge case was not entitled to a legal lien before he secured judgment on his bond. He had no equitable lien on the assets of the bankrupt. . . . nor does the decree of the State Court undertake to establish lien in petitioner's favor. The State Court, at the time the trustee in bankruptcy was appointed had not assumed jurisdiction over any assets of the bankrupt."

In this case, we call this Honorable Court's attention to the fact that petitioners cite the dissenting opinion by Judge Sibley, and we call attention to the fact that in that dissenting opinion, Judge Sibley further said:

> "On the other hand, if the State Court first takes jurisdiction to enforce a lien on specific property, a subsequent bankruptcy which does not annul the lien will not oust the State Court jurisdiction over the property, nor vest in the Bankruptcy Court power to enjoin the State Court proceeding."

Continuing, Judge Sibley quoted from the case of *Peck v. Jennes*, 7 How. 612, at page 625; This was a case in which a lien by attachment was before the State Court, which subsequent bankruptcy was held not to annul;

> "It follows, therefore, that the District Court had no supervisory power over the State Court, either by injunction or the more summary method pursued in this case, unless it had been conferred by the Bankruptcy Act. But we cannot discover any provision in the Act which limits the jurisdiction of the State Courts or confers any power on the Bankruptcy Court to supersede their jurisdiction, annul or anticipate their judgments, or wrest property from the custody of their officers."

The case of *Moore*, 42 Fed. 2d 475, decides only, that the Bankruptcy Court may determine payment of fees to attorneys in a State Court proceeding where bankruptcy superseded the State Court proceeding within four months. We also call attention to the fact that since this is a District Court decision, it hardly supports the proposition that the case at bar conflicts with applicable decisions of this Court and of Circuit Courts of Appeal;

Merry, Trustee v. Jones, Receiver, 119 Ga. 643, and *Carling v. Seymour Lumber Co.,* 113 Fed. 483, are discussed hereinafter;

The case of *McGahee v. Cruickshank,* 133 Ga. 649, was a stockholder's bill, under which a receiver was appointed within four months of the institution of the bankruptcy proceeding, and is not in point.

Petitioners urge, that the opinion in this case holds that, for a State Court insolvency proceeding to be superseded by bankruptcy, it must be based upon a State statute which attempts to give an insolvent debtor a discharge. We respectfully urge (1) that no such point was involved in this case in the Courts below, and (2) that the decision in this case makes no such holding.

The case of *Duparquet, Hout & Moneuse Co. v. Evans,* 297 U. S. 216, 80 L. Ed. 591, was a corporate reorganization proceeding under old Chapter 77B, new Chapter X, and under the terms of Section 2 (a) (21) of the present Bankruptcy Act, the present Chapter X is exempt from the four months' jurisdictional limitation, and that case is not applicable at all to the proceeding at bar.

The case of *Gross v. Irving Trust Co.,* 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, was a proceeding in 1933, prior to the enactment of Section 2 (a) (21) of the present Act, wherein bankruptcy interposed within four months of the appointment of a receiver and involved only the question of whether the State Court, under the system there, had the right to fix fees of its officers as a lien against the assets in the hands of the trustee in bankruptcy after the superior jurisdiction of the Bankruptcy Court attached.

As held by the Circuit Court of Appeals in this case, we think "nothing in any of those decisions at all makes against the position taken below. They are, indeed, authority for it."

(2)

Response to Second Ground

Replying to the second ground, we respectfully urge that the case of *Merry, Trustee v. Jones, Receiver*, 119 Ga. 643, 46 S. E. 861, cited by petitioners is not in conflict with the case at bar.

Bankruptcy in that case intervened within four months of the institution of the State Court proceeding. The State Court held that no proper case of a lien foreclosure was made, since the mortgage was not recorded, the pleadings did not describe the mortgage and there was no prayer for foreclosure. The petitioner had a mortgage, but it was also alleged that he had a debt. The mortgage was not set out in the pleadings, nor was it shown what property the mortgage covered, "the relief prayed for may have been asked as well because the complainant was a creditor as because it had a lien." (Page 647.)

The converse was held by the Supreme Court of Georgia in a later case, *Nelson, et al, v. Spence, et al*, 129 Ga. 35, 58 S. E. 697, where the Court in the first headnote said:

> "Where the main purpose of the suit is to foreclose a mortgage, and there is also an incidental prayer for relief appropriate to insolvency proceeding, a receiver's possession thereunder, as to the property included in the mortgage, will not be affected by a subsequent adjudication in bankruptcy."

See also *Carling v. Seymour Lumber Co.* (C. C. A. 5) 113 Fed. 483.

II.

CONCLUSION

A.

NATURE OF THE STATE COURT PROCEEDING

While we contend that it was conceded by all parties in the Court below that the State Court proceeding was in the nature of an equitable proceeding to enforce a judgment

lien, we will discuss that question since the petition for certiorari is based on the contention that the State Court proceeding was an insolvency proceeding tantamount to bankruptcy, instead of a proceeding to enforce a lien.

Oberdorfer having obtained a judgment lien and having been unable to enforce the payment of same by legal means, having attempted to enforce it by garnishment proceedings, as well as by levy, and after the return of a nulla bona thereon by the officer charged with the duty of enforcing it, and after having attempted to make a compromise settlement thereof, was without any remedy for the enforcement of its judgment lien except in equity. (R. 36, 37, 51, 52, 53, 54.)

All of the assets of the defendant were covered by a blanket mortgage as well as various and sundry other liens, totalling in excess of $7,000.00; the only way that the Oberdorfer lien could be enforced was in the manner pursued, i. e. an equitable bill for a receiver to marshal the assets, reduce them to cash and satisfy all liens entitled to priority over the Oberdorfer lien. This, of necessity, had to be accomplished before the Oberdorfer judgment lien could be satisfied.

The statutes of Georgia provide relief in such instances in equity, where the Courts are authorized, by statute, to appoint receivers and marshal and liquidate assets where it is necessary to do so in order to enforce such liens.

These remedies are available only to those who occupy a position like that in which Oberdorfer found itself, unable to obtain satisfaction by legal remedies.

These remedies are given under the following Sections of the Georgia Code: 37-401, 37-405, 37-407, 37-408 and 55-106. (Appx. 2, 3, 4, 5, 6.)

A petition filed under these Code Sections must affirmatively show and allege:

(a) That the creditor has a valid, pre-existing lien; and

(b) That he has exhausted every available legal remedy and has been unable to satisfy the judgment at law.

In *Smith v. Manning*, 155 Ga. 209 (3a) it was held:

> "As a general rule, a creditor without a lien or an interest in property is not entitled to an injunction or receiver in order that the property may be forthcoming to satisfy a common law judgment which the creditor might obtain on his demand."

The same proposition of law was in the case of *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365, a case arising in the Georgia Courts; it was held:

> "Ordinarily a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment."

When such a bill is filed under Georgia law all parties seeking to assert rights against the res in the hands of the Court's receiver may intervene and become parties plaintiff, and are entitled to have the position of priority of their claim determined and paid from the assets so held by the Court. See Code of Georgia for 1933, 37-407. (Appx. 4.)

The filing and sanction of the State Court bill in this case itself created an equitable lien on all of the assets of the debtor, more than four months prior to the institution of the bankruptcy proceeding. *Miller v. Sherry*, 2 Wall, 17 L. Ed. 827, 237; *Railway Co. v. Pettus*, 113 U. S. 116-124, 5 S. Ct. 387.

An examination of the allegations in Oberdorfer's petition will show that it was a proper procedure under the law and the facts for the foreclosure of a judgment lien unenforcible at law. If there are any superfluous allegations they do not change the nature of the proceeding. The proceeding WAS one for the enforcement of a lien. In *Carling v.*

Seymour Lumber Co. (C. C. A. 5) 113 Fed. 483 (Certiorari denied, 186 U. S. 484, 46 L. Ed. 1261) the Court in discussing unnecessary and unusual allegations contained in a petition, said:

> "It is true that the petition contains other averments that are unnecessary and unusual in a foreclosure suit, such as demand and refusal to pay, that the petition is for the benefit of the petitioner and other creditors, etc. . . . But the bill contains all the allegations necessary to a valid decree appointing a receiver and foreclosing the two mortgages. The fact that it contains other and unnecessary averments, even if made to conform to a statute no longer operative, does not deprive the petition of equity, and defeat the jurisdiction as to the matters well pleaded.
>
> "The purpose of the petition was among other things a foreclosure on a mortgage and the possession of the property by the receiver to be appointed by the Court, and where the Court adjudged the petition to be sufficient and made the appointment, that appointment cannot be questioned by another Court or the possession of the receiver appointed be disturbed."

The State Court proceeding in this case has been adjudged sufficient by that Court (R. 67, 68, 69) and no appeal has been taken from that order of adjudication, and the time for appeal has expired.

B.

GEORGIA INSOLVENT TRADERS' ACT

Attention of this Honorable Court is called to the Georgia Insolvent Traders' Act only because it is referred to in the case of *Carling v. Seymour, supra,* and to show that the State Court proceeding in this case was not brought under that Act, nor could it have been brought under that Act since that Act requires that the petition be brought by creditors representing one third in amount of the unsecured debts as well as other facts not existing in this case. See Georgia Code Section 28-402. (Appx. 1.)

C.

SUMMARY

The opinion of the Circuit Court of Appeals in the case at bar is based upon the principles first laid down in the case of *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, and consistently thereafter followed in such cases as: *Stellwagen v. Clum*, 245 U. S. 605, 38 S. Ct. 315, 62 L. Ed. 507; *Mayer v. Hellman*, 91 U. S. 496, 23 L. Ed. 377; *Metcalf v. Barker*, 187 U. S. 165, 23 S. Ct. 67, 47 L. Ed. 122; *International Shoe Co. v. Pinkus*, 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318; *Stratton v. New*, 283 U. S. 327, 75 L. Ed. 1060, 51 S. Ct. 465. See also the following cases involving the same point arising under Georgia law: *Yaryan Naval Stores v. Borchardt*, 217 Fed. 758; *Blair v. Brailey*, 221 Fed. 1, 136 C. C. A. 524 (Certiorari denied, 283 U. S. 634, 59 L. Ed. 1499). This principle was also followed in two Texas cases by the United States Circuit Court of Appeals for the Fifth Circuit. *Bryan v. Speakman*, 53 Fed. 2d 463; in re: *White Star Refining Co.*, 74 Fed. 2d 269.

There seems to be a reference in the petition for certiorari and the petitioners' brief to two points in reference to Section 2 (a) (21) of the Bankruptcy Act.

There is some indication that petitioners feel that Section 70 (a): U. S. C. A. Title 11, Section 110 (a), relating to the title of trustee should be construed as limiting Section 2 (a) (21), U. S. C. A. Title 11, Section 11 (a) (21). It seems clear to us that Section 2 (a) (21), being that part of the Act fixing the jurisdiction of the Court, is a limitation on Section 70 (a), and we think that this interpretation is so clear that we discuss it no further. This Court has had this question before it in the case of *Emil v. Hanley*, 63 S. Ct. 687 (March 15, 1943). It was also before the Circuit Court of Appeals in the case of *Muffler v. Pettigrew Real Estate Co.*, 132 Fed. 2d 479 (Certiorari denied by this Court in 63 S. Ct. 1329, 87 L. Ed. 1168.)

Petitioners contend that Section 2 (a) (21) does not alter the law as to the supersession of State Court insolvency proceedings by bankruptcy. We contend that Section 2 (a) (21) is authority for the decision of the United States Circuit Court of Appeals in this case, and that the decision also conforms to the law as it existed before Section 2 (a) (21) was added to the Act. If 2 (a) (21) does alter the law, it supports the decision in the Court below. If it does not alter the law, then, the decision below but reaffirms the state of the law prior to the enactment of 2 (a) (21).

We respectfully submit that the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case is not in conflict with the applicable decisions of this Court nor those of any of the other United States Circuit Courts of Appeal, nor of the decisions of the Georgia Courts, and respectfully urge that the certiorari should be denied.

Respectfully submitted,

H. A. ALEXANDER,
J. KURT HOLLAND,
BENTON E. GAINES,
JOSEPH J. FINE,
Attorneys for Respondents.

J. KURT HOLLAND,
Attorney for Oberdorfer Ins. Agency, Inc.
1116 First National Bank Bldg.,
Atlanta, Georgia.

BENTON E. GAINES,
JOSEPH J. FINE,
Attorneys for Marvin G. Russell, Receiver
1058 Hurt Building,
Atlanta, Georgia.

APPENDIX ONE

CHAPTER 28-4—INSOLVENT TRADERS

Georgia Code Section 28-402.

RECEIVER FOR INSOLVENT TRADER.—In case any corporation, not municipal, or any trader or firm of traders shall fail to pay, at maturity, any one or more matured debts, payment of which has been properly demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditor's petition, to which one or more creditors, representing one third in amount of the unsecured debts of such insolvent corporation, trader, or firm of traders, whose debts are matured and unpaid, shall be necessary parties, to proceed to collect the assets, real and personal, including choses in action and money, and appropriate the same to the creditors of such trader, firm of traders, or corporation. (Acts 1880-1, p. 125; 1889, p. 74; 1894, p. 89.)

APPENDIX TWO

CHAPTER 37-4—EQUITY

Georgia Code Section 37-401.

LEGAL AND EQUITABLE ASSETS.—Assets are either legal or equitable; the former are such as may be reached by the ordinary process of law; the latter are such as can be reached only through the intervention of equity. The former when properly before the court, shall be distributed according to legal liens and priorities; the latter, according to justice and right in the particular case, the general rule being that equality is equity.

APPENDIX THREE

Georgia Code Section 37-405.

MARSHALING ASSETS.—In all cases where legal difficulties shall arise as to the distribution of assets in payment of debts, or where, from any circumstances, the ordinary

process of law would interfere with the due administration, without fault on the part of the representative of the estate, a petition to marshal the assets shall be maintained at his instance.

APPENDIX FOUR

Georgia Code Section 37-407.

CREDITORS' PETITIONS.—Creditors' petitions may be filed at the instance of any creditor, the privilege being extended to all to appear and become parties in a reasonable time.

APPENDIX FIVE

Georgia Code Section 37-408.

EQUITABLE ASSETS FOR CREDITORS.—Equitable assets may be reached by a creditor in every case where he shows that there is danger of not being satisfied out of legal assets.

APPENDIX SIX

CHAPTER 55-1—INJUNCTIONS

Georgia Code Section 55-106.

CREDITORS WITHOUT LIEN, RIGHTS OF.—Creditors without lien may not, as a general rule, enjoin their debtors from disposing of property, nor obtain injunction or other extraordinary relief in equity. (86 Ga. 100 (12 S. E. 205).)